Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1050

RUSSELL CHARLES HUDLER,
Petitioner,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STANLEY L. DREXLER
MICHAEL J. ABRAMOVITZ
Attorneys for Petitioner
50 South Steele Street
Suite 950
Denver, Colorado 80209

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No.

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THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Russell Charles Hudler, prays for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 1a) is not yet reported. This is a criminal case which was tried to a twelve-person jury in the District Court, and thus, there is no lower court opinion.

JURISDICTION

The Court of Appeals entered judgment on November 5, 1979.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the term "false or fraudulent" under 26 U.S.C. § 7205 requires an element of deceptiveness.

(2) Whether under the circumstances of this case the inherent confusion and contradiction in the federal income tax withholding scheme precludes the required finding of "willfulness" for a conviction under the criminal tax statutes.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on two counts of having willfully supplied false or fraudulent information relating to federal withholding tax for 1977 in violation of 26 U.S.C. § 7205. Petitioner was sentenced to one year imprisonment on the first count and to two years probation on the second count. The Court of Appeals for the Tenth Circuit affirmed.

Petitioner is an elevator repairman who worked for two companies during 1977. After his attempt to furnish a Form W-4E ("Exemption from Withholding") was rejected, he furnished his employers with W-4 forms with the figure "99" in the spaces provided for reporting the number of withholding exemptions.

The primary defense raised at trial was the following:

(1) Petitioner believed that his wages were exempt from the requirement of withholding under the Internal Revenue Code because he was a member of a religious order performing duties required by the order; such wages are specifically excepted by statute (26 U.S.C. § 3401[a][9]), and therefore, petitioner held an honest belief that he was in compliance with the law.

(2) Petitioner understood that it was appropriate to indicate this exemption by writing "99" in the space provided for the number of withholding allowances on his Form W-4. He had learned these beliefs from his church superiors and from his reading of Internal Revenue Service documents.

The government prosecuted the case on the theory that the petitioner held no honest belief in his claimed exemption. There is no dispute that petitioner used the figure "99" as a "code" to stop withholding.

The primary issue before the Court of Appeals concerned the trial court's instructions to the jury. The defense contention was that the trial court misconstrued the element of "willfulness" under 26 U.S.C. § 7205, and consequently misinstructed the jury. The trial court's instructions focused the jury's deliberations on whether the petitioner honestly believed he was entitled to precisely ninety-nine withholding exemptions (as defined in 26 U.S.C. § 3402[m]), rather than on whether the petitioner honestly believed he was exempt from federal withholding. The trial court refused to give defense-requested instructions which focused on whether petitioner honestly believed he was exempt. The court instructed the jury to consider

whether the petitioner believed that he had reported the *precise number of withholding allowances*[1] rather than, as the rejected defense instructions framed the issue, whether the petitioner believed his W-4 would result in the *proper amount of withholding*.[2] The jury

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[1] The trial court gave the following jury instruction:

"If you find that the defendant in good faith believed that the Form W-4, Employee Withholding Allowance Certificate, as prepared by him truthfully reported the number of allowances he is entitled to claim under the internal revenue laws, he cannot be guilty of willfully supplying false or fraudulent information in the certificate.

"However, the offense is committed if you find that the defendant did not in good faith believe that the W-4 prepared by him truthfully reported the number of allowances, but rather you find that the defendant knew the Form W-4 as prepared by him falsely or fraudulently reported the number of allowances to which he was entitled and that he so prepared it with the intent to prevent the proper withholding and collection of his federal income taxes."

[2] The trial court refused to give the following defense-requested instructions:

(a) "The defendant in this case has testified that he believed himself to be exempt from withholding requirements because he was a member of a religious order performing services required by the order. If you find that the defendant held that belief honestly then you must find the defendant not guilty.

(b) "If you find the defendant intended to figure 99 only to be a mechanism to claim exemption or code to cause zero withholding, then you must decide whether zero withholding was false or fraudulent rather than deciding whether 99 was false or fraudulent.

(c) "The information furnished by the defendant was false if and only if it resulted in incorrect withholding amounts. It was fraudulent if and only if the defendant intended to deceive, that is to cause zero withholding. Therefore, the information in this case was false if his proper withholding liability was greater than zero at the time he furnished the information. It was fraudulent only if, knowing his withholding liability to be greater than zero, he furnished information which he intended to cause zero withholding.

(d) "If you find the defendant in good faith believed that Form W-4, Employee Withholding Allowance Certificate, as prepared by him would result in correct withholding amounts, he cannot be guilty of willfully supplying false or fraudulent information in the certificate."

was not asked to decide whether he held his belief that he was exempt in good faith.

The Court of Appeals affirmed the conviction on the ground that the instructions given by the trial court were an accurate statement of the applicable law. In so doing, the Court held that "false" and fraudulent" under 26 U.S.C. § 7205 "does not require that a statement be 'false in the sense of deceptive,' " rejecting the Fourth Circuit Court of Appeal's definition in *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974). The Court agreed with the trial court's jury instruction that a violation of 26 U.S.C. § 7205 occurs when an employee supplies false or fraudulent information when he furnish a Form W-4 to his employer "with the specific intent to interfere with the withholding and collection of his federal taxes," agreeing with the Eighth Circuit Court of Appeals in *United States* v. *Hinderman*, 528 F.2d 100, 102 (8th Cir. 1975).

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit holding below is in conflict with the Fourth Circuit's decision in *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974). The Fourth Circuit Court of Appeals has held that "false or fraudulent" in 26 U.S.C. § 7205 implies an element of deceptiveness:

> "[W]e hold that in order for a taxpayer to be convicted of supplying 'false or fraudulent' infor-

> mation contrary to section 7205 the information must either be (1) supplied with intent to deceive, or (2) false in the sense of deceptive—of such a nature that it could reasonably affect the withholding to the detriment of the government." *United States* v. *Snider*, 502 F.2d 645, 655 (4th Cir. 1974).

The Internal Revenue Service itself has issued Regulations which embody the Fourth Circuit's analysis. Regs § 31.3402(F)(2)-1(e) requires that any withholding exemption certificate indicated to be false by an employee is *invalid*. An invalid withholding exemption certificate shall be considered by the employer as a nullity for purposes of computing withholding. Such an invalid certicate is distinguished from a certificate which is valid on its face, but which the employer has reason to believe may be false. Thus, the Regulation indicates that a withholding certificate which is technically false, but which cannot reasonably affect the withholding system is to be considered a nullity.

Both Regs. § 31.3402(f)(2)-1(e) and the Fourth Circuit's analysis lead to the conclusion that 26 U.S.C. § 7205 is designed to punish the deceitful taxpayer. 26 U.S.C. § 7205 is properly viewed as condemning the W-4 certificate which, although apparently valid is, in fact, latently false.[a]

[a] Regs. § 31.3402(f)(2)-1(e) was promulgated July 26, 1976, which was prior to the activities alleged in Count II of the Information in this case. The activities alleged in Count I occurred before the promulgation of the Regulation. The rationale and reasoning of the Regulation, however, are valid regardless of its formal adoption date and, therefore, lead to the same conclusion for both Counts of the Information. The Regulation is still in force.

II. The decision of the Court of Appeals is in conflict with this Court's decision in *United States* v. *Pomponio*, 429 U.S. 10 (1976). If left standing, the decision will adversely affect the administration of the Internal Revenue laws by undermining the taxpaying public's respect for the integrity of the tax system.

A. 26 U.S.C. § 7205, as well as several other criminal sanctions in the federal tax law require "willfulness". This Court has defined "willfulness" as a "voluntary, intentional violation of a known legal duty." *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976). The opinions in *Pomponio* recapitulated the Court's discussion in *United States* v. *Bishop*, 412 U.S. 346 (1973), regarding the legal meaning of "willfulness," but even more heavily stressed the intentional, knowing aspect of willfulness. "[Willfulness] requires more than a showing of careless disregard for the truth." *United States* v. *Pomponio*, 429 U.S. 10, 12. In footnote 3 to the opinion, this Court expressly rejected the view that the requirement of willfulness could be satisfied by even an unreasonable, capricious, or careless disregard for truth or falsity. *United States* v. *Pomponio*, 429 U.S. 10, 12.

In the present case, the Tenth Circuit has followed the law of the Eighth Circuit which has held that the intent necessary for a violation of 26 U.S.C. § 7205 is:

> "The intent to interfere with the withholding system and prevent the collection of taxes in the manner prescribed by law." *United States* v. *Hindermann*, 528 F.2d 100 (8th Cir. 1975).

"Willfulness" must be included within this definition because of the language of 26 U.S.C. § 7205. "Intent" under the Tenth Circuit's definition has to be viewed, in

light of *Pomponio,* as an intentional interference with the federal withholding system as understood by the taxpayer. In order to be convicted under the statute, petitioner must be found to have intended to prevent the "proper" withholding *as he understood it to be.*

In the present case, statutory vagueness in the law of federal income tax withholding negates willfulness if petitioner honestly believed that he was exempt under the withholding provisions relating to members of religious orders. 26 U.S.C. § 3401(a)(9). The jury was never asked to decide whether he held his belief that he was exempt in good faith, as requested by the defense.

1. Confusion Is Inherent In The Law Of Federal Income Tax Withholding Regarding Who Is Exempt And Which Activities Are Authorized.

26 U.S.C. § 3401 defines the term "wages" for the purpose of federal income tax withholding. It specifically excepts remuneration paid for services performed by a member of a religious order in the exercise of duties required by such order. I.R.C. § 3401(a)(9). The only reference to this statutory provision contained in the Regulations is the following:

> "Service performed by a member of a religious order in the exercise of duties required by such order includes all duties required of the member by the order. The nature or extent of such services is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors." Regs. § 31.3401(a)(9)-1(d).

On its face, these provisions provide that if a member of a religious order is directed by his superiors to work and turn over his remuneration to the religious order,

then that remuneration is exempt from federal income tax withholding.

The Internal Revenue Service has issued several Revenue Rulings in an attempt to clarify its position regarding the operation of I.R.C. § 3401. Rev. Rul. 68-123, 1968-1 C.B. 35; Rev. Rul. 76-323, 1976-2 C.B. 18; and Rev. Rul. 77-290, 1977-2 C.B. 11. The Internal Revenue Service has attempted to develop an approach to make distinctions in this complicated area between two types of services required by a religious order of its members. It has taken the position that certain types of employment give rise to remuneration treated as exempt from income and employment taxation, while certain other types give rise to remuneration treated as received by the member and contributed to the religious organization, and is, therefore, subject to taxation. These distinctions are subtle even to the most legally sophisticated. The problem is further compounded by the fact that such distinctions do not appear in the withholding provisions of the Internal Revenue Code, in the Treasury Regulations relating to those provisions, or in the Internal Revenue Service publications available to the general public. Furthermore, both Rev. Rul. 76-323 and Rev. Rul. 77-290 were promulgated after the alleged criminal violations in this case.

The uncontradicted evidence at trial showed that petitioner relied upon two specific Internal Revenue Service publications: "Circular E, Employer's Tax Guide" and Publication 517. "Circular E" provides that:

> "Members of religious orders who have taken a vow of poverty, performing duties required by the order are exempt from federal income tax withholding, exempt from social security, and exempt from federal unemployment tax."

"Publication 517," relating to social security taxes withheld from wages, contains a specific section on its front page entitled "Members of Religious Order." Relevant sections under this heading provide that:

> "A member of a religious order who has taken the vow of poverty is automatically excluded from coverage. You need not file any applications to receive the exemption . . . . Services performed by you as a member of a religious order in the exercise of duties required by the order include all duties, regardless of the nature or extent, so long as it is a service that you are directed or required to perform by your ecclesiastical superiors."

Again, there is no mention of the Internal Revenue Service's distinction between exempt and non-exempt services.

Substantial statutory confusion and contradiction exist, and the Internal Revenue Service's own publications contribute to the confusion. If, therefore, a taxpayer claims in good faith to be a member of a religious order performing duties required by the order, then "willfulness" cannot exist, as a matter of law. The conclusion therefore is that the proper focus for the jury in this case should have been whether petitioner believed himself to be exempt as a member of a religious order performing duties required by the order.

2. Confusion Regarding The Method Of Claiming Exempt Status.

Significant confusion is also created by the statutory scheme concerning the proper method to claim the exemption. 26 U.S.C. § 3401(a)(9) provides for an exemption for members of religious orders, but 26 U.S.C. § 3402 does not provide any means for a taxpayer, such as petitioner, to claim the exemption. The only method

mentioned in 26 U.S.C. § 3402 for claiming an exemption from the requirements of withholding tax is 26 U.S.C. § 3402(n). This provision requires that an employee furnish a certificate (known as Form W-4E) which certifies that the employee not only anticipates that he will incur no income tax liability for the current year, but also, that he incurred no income tax liability for the preceding taxable year. An employee who believes that he is exempt for the current taxable year, although not for the prior year, is necessarily thrown into confusion.

The evidence presented at trial in this case indicates that petitioner attempted first to file a W-4E certificate with the certification that he incurred no tax liability in the preceding year stricken by pen and that this attempt to file the W-4E certificate was rejected by his employer. It was as a result of the employer's refusal to accept the W-4E certificate that petitioner inquired further of his religious superiors, and gained an understanding that the figure "99" was a code meaning "exempt."

In summary, the central focus of the jury's deliberation under *Pomponio* should have been the sincerity of petitioner's belief that he was a member of a religious order performing duties required by the order. The Tenth Circuit's affirmation of the jury instructions given in the present case, specifically with regard to "intent," does not properly take into account the willfulness requirement enunciated by this Court in *Pomponio*.

III. The Tenth Circuit's opinion disregards this Court's teaching in *United States* v. *Bishop, supra*. By allowing the conviction to stand in the present case, the Court would sanction the use of the criminal process in a matter which would more properly have been han-

dled in a civil manner. As this Court noted in *Bishop*, "[d]egrees of negligence give rise in the tax system to civil penalties." 412 U.S. at 349.

The "willfulness" requirement implements the intent of Congress to construct penalties that separate the purposeful tax violator from the "well meaning, but easily confused mass of taxpayers." *United States* v. *Bishop, supra.* The criminal sanctions in the tax area have been described as the "capstone of the system of sanctions which singly or in combination were calculated . . . to provide a penalty suitable to every degree of delinquency." *Spies* v. *United States,* 317 U.S. 492, 497 (1943); *United States* v. *Bishop, supra.*

In light of the complexity of the statutory withholding scheme, and the confusion created by the Internal Revenue Service's own interpretations and publications, allowing the criminal sanction in this case to stand will serve to undermine taxpayers' belief in the fairness and rationality of the tax system, and would serve to seriously impair the effectiveness of our voluntary compliance system of taxation.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

STANLEY L. DREXLER
MICHAEL J. ABRAMOVITZ
50 South Steele Street
Suite 950
Denver, Colorado 80209
Attorneys for Petitioner

December, 1979

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1639

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

RUSSELL CHARLES HUDLER, *Defendant-Appellant.*

Appeal From The United States District Court
For The District Of Colorado
(D.C. No. 78 CR-86)

Stanley L. Drexler (Drexler and Wald, Professional Company; Michael J. Abramovitz and Chester J. Stern, with him on the briefs), for Appellant.

James A. Bruton (Joseph F. Dolan, United States Attorney, Richard S. Vermeire, Assistant United States Attorney, M. Carr Ferguson, Assistant Attorney General, Gilbert E. Andrews, Robert E. Lindsay, Attorneys, Tax Division, Department of Justice, with him on the briefs), for Appellee.

Before DOYLE, BREITENSTEIN and LOGAN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

After a jury trial, defendant-appellant Hudler was found guilty of violating 26 U.S.C. § 7205 by willfully supplying false information to two employers. On Count I he was sentenced to one year imprisonment and on Count II placed on probation for two years. He appeals and claims errors in the instructions and the admission of evidence. We affirm.

Section 7205, 26 U.S.C., imposes criminal penalties on any person who is required to supply information to his employer under 26 U.S.C. § 3402, and "willfully" supplies

"false or fraudulent" information. Defendant received wages for work as an elevator repair man and was required to furnish the information. The questions are whether he acted willfully and supplied false or fraudulent information.

Count I charged that defendant furnished to his employer, U.S. Elevator Company, an Internal Revenue Form W-4 on which he claimed 99 withholding exemptions. Count II was a similar charge relating to another employer, Dover Elevator Company. Defendant admits that he furnished the forms and did not have 99 exemptions. He said that he claimed them because he understood "99" to be a computer method of symbolizing tax exempt status and would result in zero withholding.

Defendant also asserted belief that he was exempt under 26 U.S.C. § 3401(a)(9) which excludes, from wages, remuneration received by an ordained minister in the exercise of his ministry and by a member of a religious order in the performance of duties required by that order.

Defendant testified that he was a minister of a church known as the Universal Sanctuary of the Association of Jesus Christ of the United States of America, the Order of Almighty God. He said that this church was a member of a larger association called Independent American Constitutional Assembly and headed by Paul Streicher who had authority over member churches. Defendant conducted religious services in his home.

Defendant conveyed all of his property to the church and took a vow of poverty. He continued his elevator repair work. His wage checks were deposited in his bank account and checked out by him or his wife. Streicher reviewed and approved all checks. Defendant's superiors told him how to stop the withholding of taxes and furnished him with IRS publications. Defendant told representatives of his employers that "99" was a code used by his group to show

that they did not believe in paying taxes, and was a computer symbol for exemption.

Defendant claims no First Amendment violation. On this appeal, he does not argue that he was actually exempt under § 3401(a)(9) but emphazise his belief in such exemption. Defendant chose to supply the W-4 form to his employers. He may not with impunity willfully use the form to furnish false or fraudulent information. See Bryson v. United States, 396 U.S. 64, 72. His claimed belief is important only in considering whether he acted willfully.

In his attack on the instructions, defendant says that they focus improperly on the number of exemptions claimed and do not present adequately his defense of belief in tax exemption. A defendant is entitled to instructions presenting his theory of the case. United States v. Von Roeder, 10 Cir., 435 F.2d 1004, 1010, cert. denied 403 U.S. 934. The exact language requested by the defendant need not be followed. United States v. Westbo, 10 Cir., 576 F.2d 285, 289. The instructions taken as a whole must give an accurate statement of the applicable law. United States v. Afflerbach, 10 Cir., 547 F.2d 522, 524, cert. denied 429 U.S. 1098.

Section 7205 proscribes the willful furnishing of a false or fraudulent statement. The court defined willfulness in terms approved by United States v. Bishop, 412 U.S. 346, 360, and United States v. Pomponio, 429 U.S. 10, 12. The court instructed:

> "An act is willfllly done if done voluntarily and intentionally and with the specific intent to do something which the actor knows the law forbids. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law. *An act intended in good faith to conform to the law is not willful.*" (Emphasis supplied.)

After stating the elements of the crime, including willfulness, the court told the jury that, to establish willfulness, it must be proved:

> "that the defendant's conduct in supplying false or fraudulent information to his employer was done *willfully with the specific intent to violate what he knew his legal duty to me.*" (Emphasis supplied.)

The instructions on willfulness were adequate. They require specific intent to violate the law and recognize a good faith defense.

The court defined properly "false" and "fraudulent" and then said:

> "* * * the government must prove that the defendant supplied the false or fraudulent information in his Form W-4, Employee Withholding Allowance Certificate, to his employers *with the specific intent to interfere with the withholding* and collection of his federal taxes in the manner prescribed by law.' (Emphasis supplied.)
>
> * * *
>
> "In considering whether the defendant furnished false or fraudulent information to his employer, you should consider the defendant's entire communication both spoken and written, not merely the Form W-4."

Defendant offered, and the court rejected, instructions that the information furnished was false only if it resulted in an incorrect withholding and fraudulent only if the defendant intended to deceive. The instructions were derived from United States v. Snider, 4 Cir., 502 F.2d 645, 655. The Eighth Circuit in United States v. Hinderman, 8 Cir., 528 F.2d 100, 102, disapproved Snider and held that § 7205 does not require that a statement be "false in the sense of deceptive." We agree with the Eighth Circuit. The criterion is not whether the employer and the government were, or could have been, deceived. The crime is the willful furnishing of false or fraudulent information.

The instructions required specific intent and permitted consideration of both the W-4 forms and defendant's statements to his employers that "99" was a symbol to indicate tax exemption. Admittedly, defendant was not entitled to 99 exemptions. He used that figure to attain zero withholding.

Defendant relies on his belief in exemption on religious grounds, his use of "99" as a symbol, and his understanding of IRS publications. These subjective factors are for jury consideration along with all evidence presented. The number of exemptions claimed is another factor. See United States v. Smith, 10 Cir., 484 F.2d 8, 10, cert. denied 415 U.S. 978, a case relating to the falsity of a W-4 form; see also United States v. Wellendorf, 5 Cir., 574 F.2d 1289, 1290, United States v. Stephen, 5 Cir., 569 F.2d 860, 861, and United States v. Arlt, 5 Cir., 567 F.2d 1295, 1298, cert. denied 436 U.S. 911, all cases relating to a claim of "99" exemptions in a W-4 form.

The instructions given permitted the jury to consider every defense offered by defendant. They were fair, adequate, clear, and understandable with no undue emphasis on any phase of the case. They permitted acquittal if the jury believed the defendant. Credibility is for the jury, and it determined the issue against the defendant.

Defendant complains of the court's exclusion of testimony of expert witness Sorenson relating to the use of "99" in computer programs to indicate tax exempt status. No showing is made that either the employers or the government knew of, or recognized, such practice. The qualifications of the witness to testify on the subject were doubtful. The court did not abuse its discretion in rejecting the testimony. Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 10 Cir., 516 F.2d 33, 37.

After the defendant's wife testified and the evidence closed, defendant offered her testimony on the retention of her separately owned property. He argues that the testimony would support his claim of sincerely held religious beliefs. The offer came too late and, at the most, was cumulative. The offer was properly rejected.

Affirmed.